IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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**No. 77-1075**

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AMERICAN SOCIETY OF TRAVEL AGENTS, INC., *et al.*,
*Petitioners,*

v.

MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## PETITIONERS' REPLY TO MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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Petitioners, the American Society of Travel Agents, Inc. and twelve of its individual travel agency members, hereby reply to the memorandum in opposition submitted on behalf of the respondents, Secretary of the Treasury and Commissioner of Internal Revenue.

1. Respondents' assertion that the decision of the court of appeals below "is in accord with" its earlier ruling in *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130

(D.C. Cir. 1977), *cert. denied*, No. 77-681 (U.S. Feb. 21, 1978),[1] is unfounded and misleading. In *Tax Analysts*, an individual competitor of large oil companies challenged a number of Internal Revenue Service rulings which permitted such companies to claim foreign tax credits for certain payments made to foreign nations in connection with their extraction and production of oil.[2] The plaintiff contended that the payments in question should have been treated as tax *deductions* rather than as tax *credits*, and that the favorable treatment afforded his competitors placed him at a competitive disadvantage in the marketplace.[3] The court concluded "that appellant Field has *suffered injury in fact in his capacity as a competitor.*" [4] Three months later in the instant case, the same court ruled that petitioners—who alleged that respondents' improper actions had caused them to suffer competitive

[1] Respondents' Memorandum, at 3.

[2] 566 F.2d at 134.

[3] *Id.* at 135.

[4] *Id.* at 138, *citing Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), *and Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970) (emphasis added). The court went on to affirm the dismissal of Field's complaint on the ground that it did not satisfy the "zone of interest" test. *See id.* at 138-45.

Petitioners' complaint herein does not, of course, suffer such an infirmity. The statutory restrictions upon which petitioners' claims are based were adopted expressly for the purpose of protecting them and others similarly situated from unfair competition. *See* H.R. Rep. No. 2319, 81st Cong., 2d Sess. 36 (1950); S. Rep. No. 2375, 81st Cong., 2d Sess. 21-31 (1950). Indeed, the IRS itself recognized that:

> The primary objective of adoption of the unrelated business income tax was to eliminate a source of unfair competition by placing the unrelated business activities of certain exempt organizations upon the same tax basis as the nonexempt business endeavors with which they compete.

26 C.F.R. § 1.513-1(b)(1977). Denial of the instant petition would effectively render that express congressional purpose unenforcible.



injury, including loss of customers[5]—had not suffered "injury in fact." [6] With regard to the "injury in fact" issue, these cases are indistinguishable; the decisions are irreconcilable.

2. Respondents' memorandum is not responsive to petitioners' contention that the decision below fundamentally conflicts with the ruling of the Court of Appeals for the First Circuit in *Rental Housing Ass'n v. Hills*, 548 F.2d 388 (1st Cir. 1977).[7] Unlike the respondents herein, the court in the *Rental Housing* case recognized the difference between *pleading* and *proof*.[8] Respondents suggest that the purported deficiency in petitioners' complaint would have been cured had it "cited specific customer losses . . . ." In fact, the complaint did allege: (i) that respondents had improperly bestowed favorable tax treatment upon certain organizations;[9] (ii) that such treatment had resulted in a competitive advantage to those organizations;[10] and (iii) "that numerous persons who would otherwise use [petitioners'] services . . . are instead induced [to] . . . take business to tax-exempt organizations." [11] Petitioners were prepared to prove those allegations and should have been given an opportunity to do so.[12]

3. Finally, the respondents, like the court of appeals below, speculate that petitioners' injury may or may not

[5] Petition Appendix A, ¶¶ 20-32, at 5a-8a; *see* Petition, at 4-7.

[6] *American Society of Travel Agents, Inc. v. Blumenthal*, 566 F.2d 145, 148 (D.C. Cir. 1978) [Petition Appendix C, at 21a].

[7] Respondents' Memorandum, at 4.

[8] *See* 548 F.2d at 389-90. *See also* Petition, at 10-12, 16-17.

[9] Petition Appendix A, ¶¶ 23, 28-31, at 6a, 7a-8a.

[10] *Id.* ¶¶ 24, 32, at 7a, 8a.

[11] *Id.* ¶ 24, at 7a; *see id.* ¶¶ 27, 37, at 7a, 8a.

[12] *See Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Rental Housing Ass'n v. Hills, supra*, 548 F.2d at 389-90.

have been caused by respondents' rulings [13] and that the requested relief may or may not eliminate that injury.[14] The fact remains that petitioners have alleged both "causality" [15] and redressability." [16] If they are able to prove their allegations, they will, indeed, be entitled to such relief.

Respectfully submitted,

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[13] Respondents' Memorandum, at 3, 5.

[14] *Id.* at 4, 5.

[15] *See* notes 9-11 *supra* and accompanying text. *See also* Petition, at 8-10.

[16] *See* note 11 *supra* and accompanying text. *See also* Petition, at 9 n. 22, 15-16 and n. 39.